SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 646. 220

FORT SMITH LIGHT & TRACTION COMPANY,
PETITIONER,

vs.

FAGAN BOURLAND ET AL.

PETITION FOR WRIT OF CERTIORARI.

JOSEPH M. HILL.
HENRY L. FITZHUGH.

(29,956)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 646.

FORT SMITH LIGHT & TRACTION COMPANY,
PETITIONER,

vs.

FAGAN BOURLAND, M. J. MILLER, AND M. F. SMITH,
CITY COMMISSIONERS OF FORT SMITH, ARKANSAS, RESPONDENTS.

PETITION FOR CERTIORARI.

The petitioner, a corporation operating a street-car system in the city of Fort Smith, Arkansas, petitioned the City Commission, which is the governing body of the city of Fort Smith (said city being under Commission form of government), for permission to remove its tracks and cease operation on South Greenwood Avenue, a street of said city, a distance of 1,620 feet, the said line on South Greenwood Avenue being an extension of a line in said city known as the Little Rock Avenue line. The said Greenwood Avenue was about to be paved and the paving of it, together with the wornout condition of the track, necessitated rebuilding the

track at a cost of $11,030.00, should street-car operation be continued on it.

These facts and the further fact that the company was making an inadequate return on its whole property and making less than operating expense on the Greenwood Avenue line were set up and a petition to said Commission asking its permission to abandon operation upon said street.

That under the laws of Arkansas it was necessary for the street-car company to obtain permission from the governing body of the city before removing its tracks or ceasing operation.

The Commission, by an order passed in the form of a resolution, denied the petition and ordered that the company continue operation on South Greenwood Avenue and continue to maintain its tracks there.

Thereupon the company filed a complaint in the Sebastian Circuit Court against said City Commissioners.

The statutes of Arkansas provide a right of review in the Circuit Court of orders of the governing bodies of cities in their regulation of public utilities therein, which review is in an original suit, wherein the facts relating to the complained-of order can be fully developed, and the statutes further provide that the Supreme Court shall give a trial *de novo* on the record thus made of the action of the Circuit Court in the premises.

This petitioner alleged in its complaint the foregoing facts and alleged the order and resolution of the City Commission deprived it of its property without due process of law and amounted to taking private property for public use without compensation, and claimed immunity from such order and resolution under the Fourteenth Amendment to the Constitution of the United States.

The Circuit Court heard said complaint and made a finding of the value of the property, and that upon said value that the company was earning 1.715 per cent per annum, and that it would cost the company $11,030.00 to reconstruct its tracks in order to maintain service on Greenwood Avenue, and denied the relief prayed.

Thereupon the company appealed to the Supreme Court of Arkansas, which also found the facts as stated and the further fact that the company was losing the sum of $5.85 per day in the operation of its line on South Greenwood Avenue. The Supreme Court affirmed the judgment of the Circuit Court.

Contentions that said order and resolution of the City Commission amounted to confiscation and taking private property for public use without compensation were made to the Supreme Court and by it overruled.

The Chief Justice of the Supreme Court of Arkansas has allowed a writ of error to this court to review said judgment, and the writ has been duly issued and served and the record filed in this court and the citation waived.

That if the order and resolution of the City Commission amounted to an ordinance within the meaning of Section 237 of the Civil Code as amended by the Act of September 6, 1916, then, under the decision in Zucht *vs.* King, decided by this court November 13, 1922, the writ of error is the appropriate remedy to review said judgment of the Supreme Court of Arkansas, and the issuance of a certiorari would be a duplication of records, contrary to the rule which should prevail, as indicated by this court in Hanclair Trading Company *vs.* United States, decided on May 7, 1923.

The petitioner alleges that the City Attorney resisted the granting of the writ of error by the Chief Justice of the Supreme Court and stated to the Chief Justice that if this petitioner had a remedy to review said judgment that said remedy was by certiorari, not by writ of error, and the petitioner assumes that the counsel will so insist in this court.

Petitioner alleges that it is advised that if the order and resolution was construed to be a mere method of exercise of the power of the city in the premises, and not a legislative act, that certiorari is the proper remedy, and that there is doubt as to the proper construction of the order and resolution of the City Commission.

Your petitioner alleges that throughout the proceedings it has appropriately and persistently claimed its privileges, rights, and immunities under the Federal Constitution against the aforesaid action of the City Commission.

Wherefore, so that a review of the merits of the petitioner's contentions may be heard by this court against the enforcement of the said order and resolution of the City Commission, freed of a determination of a question of procedure in order to obtain said hearing, your petitioner respectfully prays that a writ of certiorari issue herein.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

FORT SMITH LIGHT & TRACTION COMPANY, *Petitioner,*

vs.

FAGAN BOURLAND, M. J. MILLER, and M. F. SMITH, *City Commissioners of Fort Smith, Arkansas, Respondents.*

To GEORGE W. DODD,
City Attorney,
Ft. Smith, Arkansas:

You are hereby notified that the petitioner herein in the above-styled cause will, on Monday, December 3, 1923, present its petition for a writ of certiorari to this court.

Given under our hands this 8th day of November, 1923.

JOS. M. HILL.
HENRY L. FITZHUGH.

The undersigned hereby acknowledges receipt of a copy of the above and foregoing notice and acknowledges receipt of a copy of the petition for writ of certiorari therein referred to.

Given under my hand this 8th day of November, 1923.

GEO. W. DODD,
Attorney for City Commissioners
of Fort Smith, Arkansas.

[Endorsed:] 29,956—646. Case No. —. In United States Supreme Court. Fort Smith Light & Traction Company, petitioner, *vs.* Fagan Bourland *et al.*, respondents. Petition for certiorari, notice, and proof of service. Hill & Fitzhugh, Attorneys for petitioner.

[Endorsed:] File No. 29,956. Supreme Court U. S., October Term, 1923. Term No. 646. Fort Smith Light & Traction Co., petitioner, *vs.* Fagan Bourland *et al.* Petition for writ of certiorari, notice, and proof of service. Filed Nov. 12, 1923.

No. 220

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

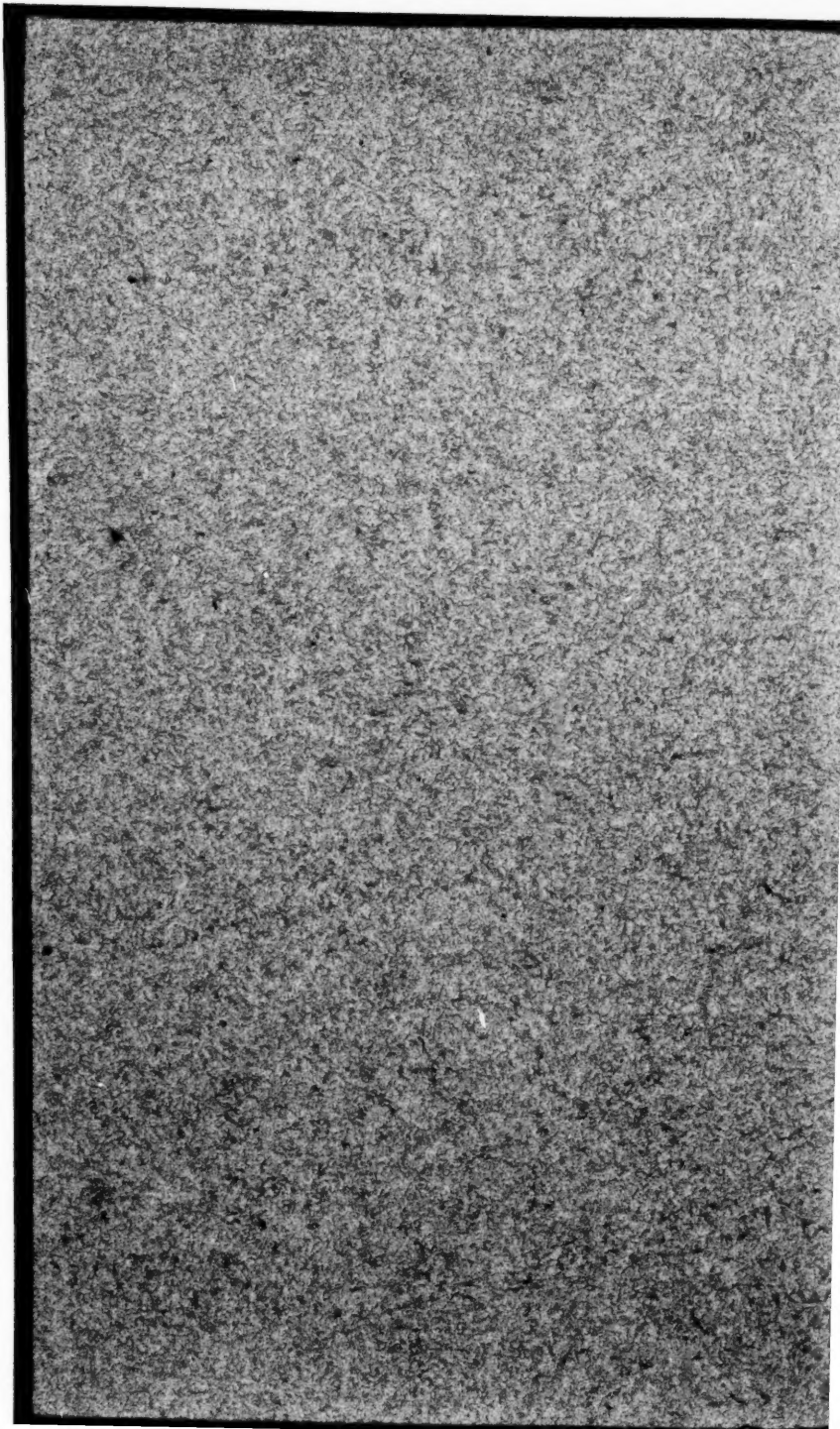
FORT SMITH LIGHT & TRACTION COMPANY,
PLAINTIFF IN ERROR,

vs.

FAGAN BOURLAND, M. J. MILLER AND M. F. SMITH,
CITY COMMISSIONERS OF THE CITY OF
FORT SMITH, ARKANSAS,
DEFENDANTS IN ERROR

BRIEF OF PLAINTIFF IN ERROR

JOSEPH M. HILL,
HENRY L. FITZHUGH,
E. H. CAMPBELL,
Attorneys for Plaintiff in Error.



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INDEX

CITATIONS

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FORT SMITH, ARKANSAS,
DEFENDANTS IN ERROR

STATEMENT

The plaintiff in error, hereinafter called "The Company," operates a line of street cars in the City of Fort Smith and a connecting line to the City of Van Buren, and a local line in Van Buren. It operates 32 miles of track, of which 22 miles are in the City of Fort Smith. For convenience of operation the street cars are divided into seven lines and accounts are kept of each line separately. All of these lines except the Van Buren local traverse Garrison Avenue, the principal business street of Fort Smith. These lines are called by various names, indicative of the principal street or locality which they serve. The one over which the controversy arises herein is called the Little Rock Avenue line.

It begins in the north part of the city at a connection with the line to Van Buren, which is usually designated as the Eleventh Street line, then runs south down Fifth Street

to Garrison Avenue, thence easterly on Garrison Avenue to its end, where Little Rock Avenue begins, and follows Little Rock Avenue a distance of 6,720 feet where Little Rock Avenue intersects Greenwood Avenue at a point known as Humphrey's corner. Then the line turns south on South Greenwood Avenue and runs a distance of 1,620 feet and terminates near the cemetery called Oak or City Cemetery. This suit is over an effort by the Company to abandon this 1,620 feet on Greenwood Avenue, leaving the Little Rock Avenue line terminating at the intersection of Little Rock and Greenwood Avenues.

Until 1919 the Company operated under franchises granted by the City; these franchises required the Company to conform its tracks to the grade of the streets and to such changed grades as the City might from time to time direct, and other requirements, which the trial Court construed as laying upon it an obligation of service, and to maintain its tracks in conformity to the City grades (R. p. 15).

Pursuant to Act 571 of 1919 creating the Corporation Commission and authorizing public utilities to surrender their franchises and to receive from the Corporation Commission an indeterminate permit, the Company surrendered its franchises and received such Indeterminate Permit.

The section of the Act authorizing this is attached in the Appendix as "A." The Act of 1919 was materially amended by Act 124 of 1921. The Corporation Commission was abolished and the powers then vested therein divided between the Railroad Commission and the City Councils (or City Commissions, as the case might be).

The Indeterminate Permit could, under said Act, be surrendered and the franchises reinstated, or the Company could continue to operate under the Indeterminate Permit, at its election. The section of the Act relating to this subject is in the Appendix as "B." The Company elected not to reinstate its franchises and continued to operate under an Indeterminate Permit (R. p. 1).

The Supreme Court of Arkansas sustained these Indeterminate Permits, holding that contract rights were not impaired by the surrender of franchises.

Camden vs. Ark. Light & Power Co., 145 Ark., 205, decided on the 27th day of September, 1920.

On the 3rd of February, 1923, the trial Court in this case decided this question otherwise.

Under Section 10 of Act 571 of 1919, no street railway corporation could cease to operate any part of its road without first obtaining the permission and approval of the Corporation Commission. This part of Section 10 was retained in Act 124 of 1921 and is to be found as "C" in the Appendix.

Under Section 17 of Act 124, the City Commissioners were given jurisdiction over such matters as the abandonment of street car service theretofore exercised by the Corporation Commission. Copy of Section 17 of said Act is found as "D" in the Appendix.

The Company petitioned the City Commission for permission to abandon the Greenwood extension of the Little Rock Avenue line. It alleged that the Company was making but little above operating expenses and that since its lines were constructed the use of automobiles had so curtailed street car traffic that it was impossible to make a sufficient income to pay the cost of operation, depreciation, and have a reasonable return on its property.

That to pay such wages as are necessary to have competent employees, and the greater cost of labor and material in recent years further absorbed the income of the Company so that as a whole it is being operated at a loss.

It then described the line sought to be abandoned and alleged that the population served on Greenwood Avenue was small, and most of the people living adjacent to it have automobiles and seldom use the street cars, and that the expense of operating the cars and maintaining the tracks on Greenwood Avenue greatly exceeded the revenue received from passengers adjacent to Greenwood Avenue and all of those using the street cars on Greenwood Avenue could have street car service without great inconvenience to them by taking the street car on Little Rock Avenue, and that by discontinuing the use of the Greenwood Avenue extension better service could and would be maintained on Little Rock Avenue.

That most of the travel on Greenwood Avenue extension was from the country, Greenwood Avenue being an extension of a county road, and not from people living adjacent to it.

That the County Court had contracted for paving Greenwood Avenue and the work is about to be done. That this paving will require the Company to readjust its grades and to put that part of its road between the tracks in such condition that the street would be safe for travel, and that such changes would cost $11,081.00. That the Company deemed its line on Greenwood Avenue not necessary for the successful operation of its system, and that it was not necessary for the public convenience, and that the line is an unnecessary expense to it and a detriment to the system as a whole.

The Company further alleged that it was an undue burden on it to meet the expenses required by the paving of said Avenue by the county, and an undue burden to require it to operate beyond the junction of Little Rock Avenue and Greenwood Avenue. It prayed permission to cease operating the Greenwood Avenue line and to have permission to take up its tracks now on said Avenue (R. pp. 8, 9).

The City Commission found that a petition for removal of the tracks had been signed by twelve citizens, and a petition against removal signed by 234 citizens, and that on investigation found that this track is demanded "By the larger majority of the people of the city." (R. p. 9.)

Whereupon the Commission proceeded to hear the petition and the evidence, and being well and sufficiently advised "Find each and every allegation in said petition against the said Fort Smith Light & Traction Company." (R. p. 10.)

It therefore passed a resolution denying the prayer of the Company and ordering the Company to continue the maintenance of its tracks on Greenwood Avenue and to operate its street car system and cars on said tracks as heretofore (R. p. 10).

The Company then filed its complaint in the Sebastian Circuit Court for the Fort Smith District, pursuant to Section 19 of Act 124 of 1921, which provided for a judicial review of such orders in the Circuit Court of the county where the

municipality is located. A copy of said Section is found in the Appendix as "E."

Section 21 of said Act 124 provided for any appeal from the Circuit Court to the Supreme Court, and that the finding of fact by the Circuit Court should not be binding on the Supreme Court, and that the Supreme Court shall review the evidence and make such finding of facts and law as it deems proper and equitable. Copy of said Section 21 is found in the Appendix as "F."

The complaint in the Circuit Court alleged the status of the plaintiff and a description of the line sought to be abandoned, and the improvement of Greenwood Avenue by the County Court of Sebastian County, and the necessity of the Company incurring large expense on account thereof, and the amount thereof, and that the Company would receive no corresponding benefit from said expenditure. Then it alleged that pursuant to the statute referred to it had filed with the City Commission a petition to discontinue street car service and to remove its tracks on Greenwood Avenue, and set forth the petition in full as part of its complaint.

It then set forth the resolution of the City Commission denying the petition and ordering the Company to continue the maintenance of its tracks and the operation of its street cars on the tracks as heretofore.

It then alleged that it brought its complaint pursuant to Section 19 of Act 124 to have the Court review the order as therein provided. It also made its complaint an independent action, aside from the statute, attacking the order of the City Commission as confiscatory, and contained the following allegation in regard thereto:

"That the Order requiring the plaintiff to continue the maintenance of its tracks on Greenwood Road and operating its street cars thereon amounts to taking plaintiff's property without due process of law, contrary to the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution of the United States, and is the taking of plaintiff's property for private use, without compensation, contrary to the provisions of the Constitution of Arkansas and of the United States."

It prayed the Court to make such order as the City Commission should have made and that the relief prayed in the petition be granted, and that it be permitted to cease operating its street cars on said 1,620 feet on Greenwood Avenue, and that it be permitted to remove its tracks therefrom, and such other and further relief as the Court may find it entitled to receive (R. pp. 7-11).

The defendant responded, in effect denying the material allegations of the complaint, and praying that the order of the Commission be affirmed and the Company be enjoined from removing its tracks on South Greenwood Avenue, and that it be ordered to continue operation of its street car system along its trackage on South Greenwood Avenue, and that the Company be required to bring its tracks to the established grade on South Greenwood Avenue (R. pp. 11-14).

The trial Court found these facts, which were thereafter adopted by the Supreme Court:

> "That the valuation of the street railway property of the plaintiff presented by said plaintiff for the purpose of this case, is fair, and, for the purpose of the case, the Court finds its value to be $934,500.00, and the Court finds that the plaintiff is making a net return on said valuation of 1.715 per cent, and that it made a profit of $16,027.74." (R. p. 14.)

The Court then decided that under the franchise the Company was obligated to reconstruct its track and to continue service and the surrender of its franchises was void as impairing the obligations of a contract, and further decided that the Act of 1921 reinstated the franchises. (The Supreme Court held otherwise as to the franchises in Camden vs. Ark. Light & Power Co., 145 Ark. 205, and the Act of 1921, Section 15, "B" in the Appendix, expressly authorized the companies then under Indeterminate Permits to continue to operate thereunder.)

Next the trial Court held the order of the City Commission was not unreasonable and confiscatory, because the plaintiff could make the improvement which it alleged would be necessary of $11,031.00 out of the $16,027.74 which it earned for the year and have the sum of $4,996.74 profit

left (R. pp. 14, 15). As this $4,996.74 would be the return on an investment of $934,500.00, less depreciation, this theory of confiscation is somewhat humorous.

The trial Court next found that Greenwood Avenue was built in a settled part of the city, which has paved streets, sewerage and electric lights, "and is fast growing in population." The Court then affirmed the order of the City Commission and denied the petition to remove the tracks (R. pp. 14-16).

The Company appealed to the Supreme Court, which, by a three to two decision, affirmed the Circuit Court on apparently two grounds, although the second one seems to be the ground upon which the opinion is rested.

First: In stating the facts before the Court the opinion states that the testimony of the witnesses was sufficient to show that there would be a substantial increase of patronage on this line in the future, and that upon a consideration of all the testimony, "We are of the opinion that it is sufficient to support a finding that the patronage of this line will increase, not diminish." (R. p. 25.)

We have reviewed the findings of the trial Court which show that there is no finding there that the patronage of the line will increase and not diminish unless it be the figure of speech that the vicinity "is fast growing in population."

The record contains that testimony in full, and in an appropriate place we will show to the Court that it falls far short of justifying the order.

Second: The opinion seems to be based upon these statements contained in the following excerpts therefrom, to-wit:

> "There is much reason for a distinction between the construction of a line as an original project and the right to withdraw it after once constructed and put into operation. Conceding that there is no absolute obligation on the part of the utility company to continue an unprofitable line, the fact that people have been induced by the establishment of the line to build homes in that locality is a necessary part of the consideration in deter-

mining whether or not it is proper for the company to be permitted to withdraw from that part of the service. The question of expenses and profits are not the only things to be considered. * * *

"Appellant could not be compelled to maintain its service at a confiscatory rate, but, as before stated, this low rate results from the operation of the utility as a whole, and the withdrawal of service on Greenwood Avenue would not materially affect the net revenues as a whole. The cost of rebuilding and maintaining this line is almost trifling in comparison with the value of the whole system and the cost of its operation. Therefore it is but simple justice to the inhabitants of this locality to say that because appellant is willing to operate its entire system at a grossly inadequate compensation, it cannot deny the same service to a locality where the line was established many years ago. The inhabitants and owners of property in this locality are just as much entitled to service as others similarly situated in the city who have a line already established." (R. pp. 26, 27.)

THE FACTS

There is no controversy over the facts, although there may be different conclusions drawn from the testimony on the subject of the development of the area in the neighborhood of Greenwood Avenue, and that testimony is set out in full on pages 5 and 6 of the record, so that the Court may have it in order to draw the proper conclusion therefrom. For the convenience of the Court the stipulated facts found on pages 1 to 5 of the record are herein set out with a correction in the Table at page 4. The third column of this table is a mathematical calculation dividing the daily cash receipts of each line by the daily car miles, in order to obtain the average cash receipts per car mile, and that column should be in cents and mills, instead of dollars and cents as printed:

"The property of the Company used and useful for street car purposes—using the taxation value as the basis thereof, which is less than the market value, was $934,540.00. Such property depreciates at the rate of 4.25 per annum.

The net earnings of the Company for the year 1922 were $68,984.99 applicable for depreciation, interest and profit, and after deducting said depreciation left a net return of $16,027.74, which is 1.715 per cent return on the value of the property. Depreciation calculated on 100 per cent condition on taxation value, the property being in 75 per cent condition, and depreciation was calculated on $1,246,053.00.

The Company operates 22 miles of street car lines in the City of Fort Smith and has lines extending to Van Buren and South Fort Smith—in all, operates 32 miles.

For convenience in operation it is divided into seven lines, all of which traverse Garrison Avenue, the principal business street of the city. One of these lines begins on the north side of the city, on the boulevard running to Van Buren, connects with the Van Buren line, thence runs south on Fifth Street to Garrison Avenue, then along Garrison Avenue to Little Rock Avenue, then southeasterly along Little Rock Avenue a distance of 6,720 feet to a point known as Humphrey's corner, thence south on Greenwood Avenue a distance of 1,620 feet, and then terminates near the cemetery known as Oak or City Cemetery.

Originally the line terminated at Humphrey's corner, but about eighteen years ago it was extended from said corner south on Greenwood Avenue to its present terminus, and was built on account of a baseball and amusement park there erected at that time. This amusement park was abandoned after two years and the Company has continued to operate on Greenwood Avenue ever since, and in 1910 reconstructed its line on the grade of the street as then laid out.

Greenwood Avenue is a city street—a continuation within the city of the Greenwood Road, one of the principal highways into the city. Several roads and streets in the city are improved by the county under an arrangement between the city and county, and Greenwood Avenue is one of these.

The streets in the city are named numerically from the river east, and Greenwood Avenue, if numbered, would be Twenty-seventh Street. A blue print map of the city showing by red lines the track sought to be abandoned was intro-

duced and is attached as "Exhibit A" to this Stipulation as part of the record.

Within the last few years there has been considerable building in the area south from Little Rock Avenue; most of these new residences are nearer Little Rock Avenue than Greenwood Avenue; some of them are nearer Greenwood Avenue and some of them are equidistant from the two. From Humphrey's corner south for the length of the line—1,620 feet—Greenwood Avenue is well built up on the west side. There is only one house fronting on the east side, but for one to six blocks east there is a group of nice residences in what is known as the Fishback Place.

South of the terminus of the line there are no buildings for five blocks, Oak Cemetery being on the east side and vacant property on the west side. Five blocks south of the line is a group of five or six residences on Pelly Hill; these are nearer by 200 feet to Park Hill car line than the Greenwood Avenue line, and a concrete street extends to the Park Hill line from them.

All of the property in the vicinity of the Greenwood Avenue extension and Park Hill Addition are within the city limits and served with water, lights and sewers. All of the people living in the group of houses in Fishback Place and on the Greenwood Avenue extension, and in the two or three blocks on Twenty-fifth and Twenty-sixth Streets recently built up, are the owners of automobiles; most of these houses have servants. The automobiles at this place, and generally within the city, have greatly decreased street car patronage.

When the Greenwood Avenue extension was built, located at the terminus of it was the principal cemetery in the city, the others being the Catholic, the Jewish and the National, and it is still the largest cemetery. Ten years ago the Forest Park Cemetery was opened in the north side of the town. The people who have used said cemetery are those who would have used the Oak Cemetery had Forest Park not been opened.

In 1922 there were total interments in Fort Smith of 500—188 in Oak Cemetery, 127 in Forest Park.

Shortly before the bringing of this suit the County Court

decided to construct an asphalt pavement on Greenwood Avenue for a distance of more than a mile, beginning at the terminus of the street car line and building north.

Thereupon petitions for and against the removal of the street car line on Greenwood Avenue were presented to the City Commission, which did not act upon them.

Thereafter the Company petitioned for permission to abandon its line on Greenwood Avenue, and set forth the expense of building a new line caused by the construction of said pavement and the loss in the operation of the present line.

It was from a denial of this petition and order of the City Commission to continue operation that this suit was brought. The testimony of the general manager, the engineer and the auditor of the Company show the following facts:

The ties and rails on the Greenwood Avenue extension were old and worn out, and the track laid on the surface of the street, which was unpaved, and the construction of a pavement required a reconstruction of the line to conform to the new grade, and the condition of the ties and rails was such that they could not be used in the reconstructed line and would not in any event have lasted more than six or eight months, and it was necessary for the Company to build an entirely new line from Humphrey's corner to the terminus. The cost of standard construction of this, conformable to the standard construction of the rest of the line, would be $11,031.00 after allowing salvage for the rails.

A lighter line could be constructed for $6,000.00, but the standard construction costing $11,031.00 would be more economical. The net revenues of the Company (not deducting depreciation and using round numbers only) from 1905 to 1922, showed that 1911 was the highest, $83,000.00; 1912 was the lowest, $8,000.00; 1916 they were $25,000.00; 1917, $48,000.00; 1918, $46,000.00; 1919, $61,000.00; 1920, $71,000.00, and 1921 was $68,334.87 and 1922 $68,984.99.

The fare was five cents until 1919, when it was increased to seven cents, which still exists. Seven cents is as high as the fare can be made without losing more from patronage

than would be gained by the increase. The Company has put in a weekly pass to increase revenues, and done everything possible to increase its revenues and operates as economically as possible.

The Company's statistics are kept by each line. The statistics of 1922 for each line reduced to a basis of average cash receipts per day per car is as follows, to-wit:

	Average Cash Receipts Per Day	Divided by Average Car Miles Per Day	Average Cash Receipts Per Car Mile Per Day
Eleventh	$297.30	920.51	$0.3229
Little Rock	108.25	427.83	.2530
Grand	97.07	367.14	.2644
"E" Street	67.22	349.85	.1921
Park Hill	100.24	396.07	.2531
South Fort Smith	54.19	205.06	.2642
Van Buren Local	16.08	138.44	.1161
Total all lines	$740.35	2805.21	$0.2639

The average daily receipts per month of the Little Rock Avenue line for 1922 were as follows, to-wit:
Jan., $106.25; Feb., $106.52; March, $103.35; April, $103.59; May, $117.92; June, $106.98; July, $135.06; August, $100.17; Sept., $104.56; Oct., $112.58; Nov., $111.91; Dec., $119.43; Average, $108.25.

The Company put men on the cars to make an actual count of the traffic on the Greenwood Avenue extension and of those who were Cemetery visitors for 25 days, making the count at different periods in the months of November and December, 1922, and January, 1923; this showed an average per day of 202 passengers and an average of 11 fares of visitors to the Cemetery; and that more passengers embarked and debarked at the end of the line than other places; those visiting the Cemetery used the cars both ways, which meant an average of five and one-half people per day visiting the Cemetery.

In 1923 the average car mile expense was 19.23 cents.

Using this as a basis for the expense on the Greenwood Avenue extension and allocating the revenue from the traffic on the Greenwood Avenue extension, which was done by taking its proportion to the average haul on the Little Rock Avenue

line, it was found that the gross receipts applicable daily to this section were $2.40 and the total daily expenses were $8.25, which left a net loss of operating the Greenwood Avenue extension of $5.85 per day, or a net loss of $2,133.25 per year; this on operation alone. Depreciation and interest on the investment was not included in said calculation.

The present operation of the Company is to give for part of the day a fifteen minute service on the Little Rock Avenue line, including the Greenwood Avenue extension, and the rest of the day for about one-half the time a twenty-minute service.

If the Greenwood Avenue extension were cut off of the Little Rock Avenue line the Company would save one car in operating that line and have a 15-minute schedule for the entire day. The Company is now using four cars per day, whereas with that extension eliminated, with three cars per day, there would be a 15-minute service throughout the day. This change in operation would still preserve intact the line and the transfer system to Van Buren, and would reduce the cost of operation by $3.56 per day, assuming that one-third of the traffic on Greenwood Avenue would be lost.

The weather during the season when the tests were made was fair and there were no rains. Some witnesses testified that there were more visitors to the Cemetery in summer than in the fall and winter months, while others testified that fall months would be a fair average of the year." (R. pp. 1-5.)

On the subject of the development in the Greenwood Avenue section the testimony is found on pp. 5 and 6 in full, and the substance of it is as follows:

R. T. LITTLE, a real estate agent testified that there had been rapid growth in the last year or two with reference to building houses in that vicinity. That a good deal of territory was left there upon which houses can be built or are in progress of building. He had sold several lots that had passed into the hands of prospective builders and knew of others being sold. These are in Reeder Addition, lying between Fishback Place and Oak Cemetery; he thinks prospects are good for this vicinity to be developed in the next year or two, and there has been as much development out Little Rock Avenue, not all the way out, for two or three blocks on each

side of Little Rock Avenue and extending out Greenwood Avenue in the last two or three years as any other part of the town, and more than most places.

He sold 10 lots one block north of the Cemetery, beginning at the car line and running east two blocks, and one house had been built on them, with prospects of others. Five houses will probably be built there this spring. There had been gratifying progress in that end of the town, particularly on the Little Rock car line radiating back on 25th and 26th Streets. Two blocks is considered good service, three blocks is a little far away. Some of the territory on the Greenwood Avenue extension was undesirable as a residence district until a short time ago, but it had recently been filled in. (R. p. 5.)

R. F. WALKER, a real estate dealer testified that there had been considerable building in the last few years along that stretch on both sides and there are prospects of it continuing for the next year or two. There is a good deal of vacant property not built upon. That there is not a great deal of vacant territory in Fort Smith outside of Park Hill Addition, which is largely vacant property, and lies west of Greenwood Avenue.

There are no buildings on Dodson Avenue which is at the end of the extension of the line south except some houses on the corner and the west side of Greenwood Avenue, and nothing south of that until Pelley Hill is reached. There is no development on the east side of Greenwood Avenue fronting the car line extension. There is one house there built about 10 years ago; the other houses are situated further back. The people in that territory can be served by the Little Rock Avenue line. It is all within walking distance. East of Fishback Place there are no houses, and no chance of development there. (R. p. 5, 6.)

MRS. VINCENT testified she lives at the terminus of the street car line and has recently built some new houses there on the west side of Greenwood Avenue. She uses the street car some and the automobile the balance of the time. She has two tenants who use the cars frequently; and that the other side of the street has four families who use the cars regularly and it is used every day by some people and she is

of the opinion it is used as much as any other line in the city. (R. p. 6.)

MRS. McCANN lives on Pelley Hill, which is a settlement five blocks from the end of the street car line, containing a half dozen houses. She says the people living there use the Little Rock car line, rather than the Park Hill line, and that in the last two or three years the number of people who use the car line has increased rapidly; she has not kept count of the patrons, but gives this as her impression. She rides the car part of the time and part of the time uses an automobile. (R. p. 6.)

VICTOR ANDERSON, manager of the Brick Plant, which is located on the Greenwood Road about a mile from the terminus of the Little Rock Avenue line; he visits the plant frequently; he says that 50% of the employees live around the plant and the others in town; those who live in town use the street car; that nine-tenths of them go the Burke road which carries them into the Little Rock Avenue line at Humphrey's corner and does not take them on the Greenwood Avenue extension. Some of the others go on the Park Hill car line and some on the Greenwood Avenue extension; he employs more men in the summer than in the winter. He sometimes goes by Park Hill line and sometimes by the Little Rock Avenue line. (R. p. 6.)

ASSIGNMENT OF ERRORS

"Now comes the Fort Smith Light & Traction Company, petitioner herein, and plaintiff in error, by its attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with its petition for writ of error makes and declares the following assignment of errors, to-wit:

"FIRST: The Court erred in not holding that the order of the City Commission of the City of Fort Smith, Arkansas, of date November 10, 1922, denying the petition of the Fort Smith Light & Traction Company to remove its street car tracks from South Greenwood Avenue, and ordering the said company to continue the maintenance of its tracks on South Greenwood Avenue, and to operate its street car system and cars on said tracks as heretofore, was void because it deprived said Fort Smith Light & Traction Company of its property

without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

"SECOND. The Court erred in not holding the aforesaid order complained of in the complaint of the said Fort Smith Light & Traction Company was void, because it amounted to taking private property of said Fort Smith Light & Traction Company for public use without compensation. By reason whereof this petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done. Done this, the 29th day of October, 1923." (R. p. 30.)

ARGUMENT

The case, in brief, presents this situation: The Street Car Company is making a net return of 1.715 per cent on its investment, using the taxable value as the basis, and it is an admitted fact that this value is less than the market value (R. p. 1).

Hence even this return is a delusive one.

The Greenwood Avenue extension instead of making 1.715 per cent on the investment in it is making a daily loss in operating expenses of $5.85, amounting to an annual loss of $2,133.25. To obey the order of the Commission to maintain the tracks and operate the cars will entail an immediate expenditure of $11,031.00.

The evidence shows that this vicinity where this line is located has grown in the last few years, more so than most other places in the city, but notwithstanding this growth the patronage of the line now presents a deficit in daily operation of $5.85 and doubtless was greater before this growth occurred. There is testimony indicating that there will be considerable development in the next year or two, but no evidence indicating as much as there has been in the past, and not even a prophecy that the future growth will be sufficient to afford such patronage as will overcome this deficit, to say nothing of interest on the necessitated investment. The investment, if it were charged to capital account, would certainly be entitled to earn 6 per cent interest. This would amount to $661.86 per annum. The street car fare is 7 cents. The evidence showed this is as high as the

Company can charge without losing more patronage than it would gain by an increased fare.

In order to overcome the present deficit it would be required to have 84 passengers more per day to produce, at 7 cents, an income equal to $5.85, the present deficit, and adding the interest on the investment, which would amount to $1.82 per day, would require 26 more passengers to meet it, making in all 110 passengers per day of increased patronage to overcome the deficit and pay interest on the investment of rebuilding the line.

The tests of the traffic on the line which the Supreme Court accepted as accurate and representative, showed a daily average of 202 passengers; and after all of the gratifying development testified to by the real estate men. In order to break even under this order the patronage would have to be increased more than half.

The gross sum received from the increased patronage on this line would not all be applicable to it, because these passengers are carried beyond this line, and the expense beyond this line would have to be taken from the gross income received on this line in order to ascertain the proportion of the income from this increased patronage which is applicable to this line. But for the purpose of demonstrating the insufficiency of the evidence of any substantial hope of an increase sufficient to overcome the deficit, it will suffice to treat all of the supposed increased income as applicable to this line.

It will be noted also that this $5.85 daily loss is on operation alone; depreciation and interest on the investment are not included in said calculation (R. p. 4).

Where a company as a whole is making an inadequate return, can it be required to rebuild a line at a cost of $11,031.00 and to maintain that line at an annual loss (including interest on a new investment) of $2,795.11?. To put it another way, is it the equal protection of the law to require this Company out of its meager earnings to favor this community by maintaining a service to it which entails said annual loss and requiring an initial expenditure of $11,031.00 to obey the order to continue this service?

Is it due process of law to require this Company to spend said money to continue said service and to be annually penalized in said amount, when the only theories upon which such action is based are, first, that there is evidence showing that there will be a "substantial increase in the patronage on this line in the future," although there is no evidence whatsoever that such "substantial increase" will be sufficient to overcome the deficit in operation, and second, because the entire system is operated at a grossly inadequate compensation, it cannot deny the same service to a locality where the line was established many years ago?

We expect to show from the authorities that this last theory is an unsound proposition, but even if it were sound generally it would not be in this case, where the condition of the line requires its rebuilding at an expense of $11,031.00 in order to continue to operate. In view of this fact it should certainly be placed on the basis of a new line.

This system as a whole earns operating expenses and 4.25 per cent for depreciation, and had left for the year 1922 $16,027.74 as a return upon its investment, which amounted to 1.715 per cent return on the value of its property (R. p. 2).

This line, however, does not earn its operating expenses; does not earn any depreciation; does not earn any return upon its property, but entails an annual loss as it stands now, without rebuilding, of $2,133.25.

These property owners who have bought property in the vicinity of this line have failed to bring the line up to the average of the rest of the system, and to continue the service to them is to make them favored patrons of a line when they are not entitled to this favoritism.

The Supreme Court said that "the cost of rebuilding and maintaining this line is almost trifling in comparison with the value of the whole system, and the cost of its operation." The trial Court in another way expressed the same thought when it held that from the income of $16,027.74 the Company could pay out the $11,031.00 necessary to rebuild the line and "have the sum of $4,996.74 profit left," and the trial Court held in view of this profit of $4,996.74 on an investment of $934,500.00 that it was not un-

reasonable and confiscatory to require it to expend this money for rebuilding this line (R. pp. 14, 15).

This is approximately one-half of one per cent return on the property for that year if this investment was made out of operating expenses, which the trial Court indicated should be done.

The trial Court was as much out of line with the decisions of this Court on the subject of what is a reasonable return as he was out of line with the Supreme Court of Arkansas on the surrender of the franchises being an impairment of the obligation of a contract.

The statement of the Supreme Court of Arkansas referred to, however, is incorrect, for the cost of rebuilding and the cost of maintaining this extension are not trifling in comparison with the value of the whole system and the cost of operation, and the opinion is not correct in stating that it "would not materially affect the net revenues as a whole."

The initial cost of this rebuilding, $11,031.00, if charged to operating expenses would reduce the net return for this year to $4,996.74, thereby reducing the net return of the Company from 1.715 per cent to about one-half of one per cent. The cost of this rebuilding is nearly three-quarters of the net income of the one year, which certainly would "materially affect the net revenues as a whole."

If the $11,031.00 is charged to capital account, then there must be added at least 6 per cent interest to that amount as a charge against this line; that will produce an annual deficit on this line of $2,795.11—nearly one-fifth of the net income per annum of the whole system. Certainly this is not "almost trifling."

If the petition were granted and the track abandoned, assuming the income of 1922 to be maintained, then instead of $16,027.74, the Company's income, eliminating the deficit on this line, would be $18,160.99 and better service would be maintained on Little Rock Avenue with a lesser expense.

For the current year if the extension was built from income, the result would be a net income of $4,996.74,

whereas if the line was not reconstructed and this extension abandoned the net income would have been $18,160.99, a difference of $13,164.25, which amounts for that year to an equivalent of a return on the investment of $934,500.00 of 1.40 per cent, which is certainly not a trivial matter when the present return is only 1.715 per cent. In other words the turn of this case means for the current year 1.40 per cent on the entire investment of the street car property, and for the future a relief of $2,133.25 per annum of loss in operation of this line, or an annual penalty of that sum.

It is submitted that the Court was in error in applying the doctrine of *de minimis non curat lex* to the cost of rebuilding and the maintenance of this line.

This situation probably parallels many similar instances throughout the United States. This locality has enjoyed street car service many years. The automobile has cut the life out of street car traffic, and this is a community where the automobile flourishes. There has been in recent years gratifying building development in this vicinity by people who own automobiles, and instead of patronizing the street cars they build nice homes and use automobiles; and their servants and some people from the country and a few cemetery visitors and occasionally the residents, when their automobiles break down, are the only patrons of the street cars.

The line was operated at a daily loss, even after all of this development had occurred. There is some evidence indicating that more residences will be built in this vicinity: one house has been built and it is expected that five more will be in the spring, and the hope expressed that at least five more will be built in the next year or two, but if these hopes were realized and multiplied many times over, still the population there would be insufficient to increase the patrons by 110 per day, as there is not space enough, if every lot was built on, which number is necessary in order to overcome the deficit now existing, and the increased deficit which would exist from interest on the investment necessary to continue the operation of the cars.

There is nothing in the record whatsoever which will justify the finding of materially increased patronage, to say

nothing of an increased patronage sufficient to overcome this deficit; and we invite your attention to it.

MRS. VINCENT testified that in her opinion the line was used as much as any other line in the town (R. p. 6.) The undisputed statistics of the Company show the average daily receipts of the Little Rock Avenue line, of which this is a part, to be $108.25, while the Eleventh Street car line was $297.30. But the average daily receipts per day mean nothing of themselves, but when reduced to the average receipts per car mile, then there is a concrete meaning to the statistics.

This Little Rock Avenue line produced an average daily receipt per car mile of .2530, which the Table on page 4 of the Record shows to be lower than four lines in Ft. Smith and only higher than one line in Ft. Smith and the local line in Van Buren. Hence, Mrs. Vincent's off-hand opinion must give way to the established facts.

MRS. McCANN lives in a settlement five blocks south of the terminus of the line, which is nearer the Park Hill line than to this line, and she says the people in that settlement use this line, rather than the Park Hill line, and that during the last two or three years the number of people using the car line has increased rapidly; she makes no prophecy of the future. Certainly the expense of this extension was heavy two or three years ago before this great increase occurred, as the deficit is now $5.85 per day after this great increase.

MR. LITTLE says that for the past two or three years there has been more development in this vicinity than in most places in the city. He calls it "gratifying progress."

MR. WALKER says there has been considerable building in the last few years in this area. This evidence merely proves that the conditions have been worse, and probably proves that the Company should have sought an abandonment of this line several years ago, but it was not then confronted with an expenditure of $11,031.00 to continue its operation, and probably it had hopes that the "gratifying progress" would be reflected in the street car earnings.

MR. LITTLE states that he thinks the prospects are good for this vicinity to be developed in the next year or

two, and states that he had sold 10 lots there, and that one house had been built and five more will probably be built in the spring. (R. p. 5.)

MR. WALKER after stating there had been considerable building there says: "There is a prospect of its continuing through the next year, or so." (R. pp. 5, 6.)

This was all the testimony upon which there could be a finding that there would be a substantial increase in the patronage and there is not even a scintilla to show that such increase will be sufficient to overcome the present deficit in operation. The evidence is much stronger of an increase in the past than indicative of an increase in the future, and yet with all of this development for the past two or three years and the rapid increase in patronage for the past two or three years, as Mrs. Vincent testified, a deplorable condition exists. This line on Greenwood Avenue as it now stands entails an annual loss to the company of $2,132.35 in operation alone.

When a public utility challenges an administrative order or a legislative act as conflicting with its rights under the due process clause, it is entitled to the independent judgment of this court as to the facts, as well as the law. Bluefield Water Works Improvement Co. vs. Public Service Commission, 262 U. S. 679; Ohio Valley Water Co. vs. Ben Avon Borough, 253 U. S. 287.

Mr. Justice Hughes speaking for this court in Northern Pacific Ry. Co. vs. State of N. Dakota, 236 U. S. 585, stated:

> "This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," citing many cases.

In K. C. S. Ry Co. vs. C. H. Albers Commission Co. 223 U. S. 573, Mr. Justice Vandevanter speaking for the court said:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions

of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

In Truax vs. Corrigan, 257 U. S. 312, the Chief Justice reviewed this subject and stated:

"In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a State Court, practically to prevent a review here. * * * * (Citing cases.)

"Another class of cases in which this Court will review the finding of the Court as to the facts is when the conclusion of law and findings of facts are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. * * * * (Citing cases.)

"In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this Court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this Court is bound by the judgment of the State Supreme Court is in the con-

struction which that Court puts upon the statute." (Citing cases.)

While this case is not determined on demurrer, yet the detailed facts upon which the State Court acted are set out in the record, and on the application of those facts to the proceedings the State Court held plaintiff's property was not taken without due process, and therefore those facts must be analyzed by this Court, and this Court must draw its own inferences as to their ultimate effect, and is not bound by the conclusions of the Supreme Court in this regard.

It may be appropriate in this connection to call attention to the fact that Justices Wood and Hart dissented "on the ground that the judgment should be reversed on the evidence."

Fort Smith Light & Traction Co. vs. Bourland, 160 Ark., on p. 17.

THE LAW

There are many cases in the books involving the question of the abandonment of lines, or parts of lines, that are determined by the charter or franchise provisions. As there are none of those in this case, that line of cases must be put to one side. The cases dealing with this subject outside of charter and franchise provisions roughly divide themselves into three classes:

(a) Where the company is making an adequate return, and then the question of the return on the line to be abandoned, or to be constructed, is of minor importance and the case turns wholly on a question whether there is sufficient patronage to make reasonable a requirement for the service and the question of whether the particular service is in and of itself remunerative is not considered a factor of importance. Of this class is People vs. McCall, 245 U. S. 345; Atlantic Coast Line Ry. Co. vs. North Car. Ry. Commission 206 U. S. 1, and Colorado & Southern Ry. vs. State Ry. Commission, 54 Col. 64. (s. c. 129 Pac. 606.)

(b) Where the company is hopelessly bankrupt and has no means of raising funds, either for an extension of facilities,

or for paying the expense of continuing an old service; in which event the courts are powerless to either order extensions or forbid abandonment. Of this class is Ry. Commission vs. Freeo Valley Ry. Co., 119 Ark., 239; Jacks vs. Williams, 113 Fed. 823; (s. c.) 145 Fed. 281.

(c) Where the company is making an inadequate return on the whole, and the particular branch or line sought to be abandoned is of itself a losing proposition, making less than the line as a whole; then it is the duty of the company to restrict its losses by lopping off these unprofitable lines, rather than making favorities of that smaller public whose patronage does not make the line self-supporting.

Of this class are the cases of Miss. Ry. Com. vs. M. & O. Ry. 244 U. S. 388; Brooks-Scanlon Company vs. Ry. Com. of La., 251 U. S. 396; Selectmen of Amesbury vs. Citizens Electric Co. 199 Mass., 394; (s. c.) 19 L. R. A. (N. S.) 865, and State of Iowa vs. Old Colony Trust Co., 215 Fed. 307; see an exhaustive note to this case in L. R. A. 1915-A, p. 549.

The Circuit Court of Appeals of the Eighth Circuit in last case mentioned reviewed fully different applications of the principle involved on this subject.

The Supreme Court in its decision in this case (R. p. 25) quoted from the decision in People ex rel. N. Y. & Queens Gas Co. vs. McCall, 245 U. S. 345, but did not discriminate that said case fell within the classification which we have enumerated as "a," whereas this case falls within the classification which we have enumerated as "c."

In considering the McCall case attention is first called to the fact that it was a utility supplying gas which was involved, and the evidence showed that the community of Duglaston, the one in controversy, was a rapidly growing settlement of 330 houses of an average cost of $7500.00, "thus giving assurance that the occupiers of them would be probable users of gas." The utility here involved is a street car company, and the new houses built and prophesied to be built in this community will be built by owners of automobiles (R. p. 3) who will seldom, if ever, use the car line.

In the McCall case the Commission found that the new investment required to supply this community with gas

would be $45,000.00 and there was a difference in estimates as to whether the return upon this investment would be two and one-fourth per cent per annum, or four per cent per annum, and the court stated:

> "There is no showing in the record as to the fair value of the entire property of the Gas Company used in the public service, nor of the rate of return which it was earning thereon, and therefore, even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable."

In this case there is a showing even on the taxable valuation that the entire property only earns 1.715%, and that the line in controversy is operated at a daily loss in operating expenses. Therefore, what was said about corporations circumstanced as this gas company not being permitted to "pick and choose" cannot be applicable here. The principle applicable here is applied in Mississippi Ry. Co., vs. Mobile & O. Ry. 244 U. S. 388, which was written by the same learned Justice who wrote the McCall opinion and certainly he was announcing no inconsistent principle, but in each case was applying sound principles applicable to the particular facts, as he (Mr. Justice Clark) stated in the latter case, this is a question of law arising on the facts of each case.

The Railroad in this case was making a wholly inadequate return—about $85,000.00 above operating expenses, and in order to better its financial condition had ordered the discontinuance of six trains, which involved a loss of $10,000.00 a month. The community served was left with some service, but much less service than through the discontinued trains, just as in this case the community will be served if this line is discontinued, and there will only be an inconvenience to the last two blocks away from the Little Rock Avenue line, as it is considered good service to be within two blocks of a line, and only one side of that street is built up; hence it is only a very small community being put to a slight inconvenience here.

Proportionately the expenses of continuing this line is greater than the expense of continuing the six trains on the

Mississippi railroad. The court reached this conclusion on the facts there:

> "Looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail, we fully agree with the district court in concluding that the order of the Commission at the time and under the circumstances when it was issued was arbitrary and unreasonable and in excess of the lawful powers of the Commission, and that if enforced it would result in such depriving of the railroad company of its property without due process of law as is forbidden by the 14th Amendment to the Constitution of the United States."

In Brooks-Scanlon Co., vs. Railroad Commission, 251 U. S. 396, the Court said:

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage."

It is respectfully submitted that the court applied an inapplicable lines of cases, rather than the applicable line to the facts here.

In the opinion of the court is this statement, which seems to be the real basis upon which the judgment is rendered, to-wit:

"Conceding that there is no absolute obligation on the part of the utility company to continue an unprofitable line, the fact that people have been induced by the establishment of the line to build homes in that locality is a necessary part of the consideration in determining whether or not it is proper for the company to be permitted to withdraw from that part of the service." (R. p 26.)

In opposition to this statement we present the following:

The Illinois Court in Ohio & M. R. Co. vs. People, 120 Ill., 200, (s. c.) 11 N. E. 347, said:

"If the line of road is not capable under any management of being made self-sustaining, it simply shows there is no demand or necessity for the road, and the sooner, therefore, the state revokes the franchise the better. A business that will not pay ought not to be followed, as it adds nothing to the wealth of those pursuing it, or of the state."

The Kansas Court in State ex rel. Little vs. Dodge City, M. & T. R. Co. 53 Kan., 329, 24 L. R. A. 564, stated:

"If a railway will not pay its mere operating expenses, the public has little interest in the operation of the road, or its being kept in repair."

The Colorado Commission in Thormann vs. Denver & I. R. Co., P. U. R. 1916 E, 430, said:

"Evidence introduced by property owners to the effect that abandonment of street car service and the removal of street railway tracks will depreciate the value of property, or to the effect that an extension of street railway tracks will appreciate the value of property, cannot be considered by the Commission. Every public utility under the jurisdiction of the Commission must furnish, provide and maintain such service, instrumentalities, equipment, and facilities as shall promote the health, comfort and safety of its patrons, employees, and the public; and as shall in all respects be adequate, efficient, just, and reasonable; but the Commission has no authority to order an extension of a street railway line because it will enhance the value of property, nor has it the authority to prohibit the removal of street railway tracks for the reason that the removal of said tracks will depreciate the value of property. This Commission is not an instrument to aid in increasing real estate values, nor to lend assistance to property owners to maintain the present value of their property."

The Oklahoma Commission in City of Sapulpa vs. Sapulpa Electric Interurban R. Co. P. U. R. 1918 D, p. 529, quoted the above statement from the Colorado Commission, and made this statement:

"It is an established principle of law that a public utility, such as an electric line or a gas line, cannot be maintained merely for the value which it may add to the property served.

Such utilities are intended to serve an entire city or community and the effect of the maintenance of any particular line or portion of the service must be considered in relation to the part it bears to the entire service. Hence a line which serves few patrons and which is being maintained at a heavy loss should be discontinued. Otherwise, this loss will fall upon the entire city or community, and will place an unnecessary and undue burden upon the entire service, and will make rates therefor unnecessarily high, in order to afford the utility a return on its investment. This does not mean that a utility can select the portions of a city where the returns will be unusually large and neglect all the other portions; or that a community where the prospects of development are bright and where service will eventually be profitable should be neglected; but it does not mean that the utility should not be required to maintain service where it is not urgent and where losses are great, in order to boost or maintain prices of property in that community."

The principle involved in these statements from courts and Commissions should commend itself as sound, because it is a principle which prevents favoritism by a public service company. To require a public service company to furnish facilities to a public whose patronage does not sustain the service rendered them, is throwing the burden of its maintenance on the balance of the public and making that small public who are served without contributing their proper share to the support of the public utility favored at the expense of the whole public.

THE PROCEDURE

This record is here by writ of error granted by the Chief Justice of the Supreme Court of Arkansas.

The learned counsel for the city opposed the granting of the writ of error on the ground that the remedy of the plaintiff in error was by certiorari, instead of by writ of error. Notwithstanding his objections on said ground, the Chief Justice was of the opinion that writ of error would lie and accordingly granted the same.

Owing to the fact that this is a border line case as we view it between a review by writ of error and a review by

certiorari, we petitioned this court for a writ of certiorari to issue upon the record brought here on the writ of error, and that petition is now for consideration of this court on this record at this time.

The matter under review is an order of the City Commission of the City of Fort Smith made under and pursuant to the Act of 1921 clothing it with jurisdiction to make orders in the premises.

That order refuses permission of the company to take up its tracks on Greenwood Avenue and orders it to continue the operation of its cars thereupon as heretofore.

In order to comply with that order the undisputed facts showed it would be necessary to expend the sum of $11,031.00 in the re-construction of the line and the continued operation of street cars on said line causes an annual deficit in operating expenses on it of $2,133.25.

The said order is attacked in the statutory method in the complaint, and the complaint is also an independent action, as well as the statutory review, on the ground that said order amounts to the taking of the company's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which is set up and relied upon as a defense against the enforcement of said order.

The Circuit Court of Sebastian County, Arkansas, which was the trial court, after a trial de novo affirmed the order of the City Commission. An appeal was taken to the Supreme Court of Arkansas which heard the case on the record as made in the Circuit Court and tried the same as chancery appeals are tried and affirmed the judgment of the Circuit Court affirming the order of the City Commission.

In Zucht vs. King, 260 U. S. 174, this court decided that a city ordinance was a law of the State within the meaning of section 237 of the Judicial Code as amended, which provides for a review by the Supreme Court by writ of error.

The action of the City Commission was not technically in the form of an ordinance, but was in the form of a resolution, which was an appropriate form in which to place the

order of that body, and therefore, we think the writ of error is the appropriate remedy.

Mr. Justice Vandevanter in Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, draws the distinction between cases reviewable by certiorari and by writ of error, and collects the cases applying these remedies.

It seems to us that under the authorities the writ of error is the proper remedy. If we are mistaken, however, clearly the facts presented here are such as authorize the issuance of certiorari and the decision of the question presented on that writ.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

APPENDIX

Excerpts from Acts bearing on the Issues.

INDETERMINATE PERMITS

A

Sec. 15 of Act 571 of 1919, approved April 1, 1919, is as follows:

Section 15. Surrender of Franchise; Indeterminate Permit; Contracts. Any public utility operating under an existing license, permit or franchise, shall upon filing at any time prior to the expiration of such license, permit or franchise and prior to the 1st day of January, 1925, with the clerk of the municipality which granted such franchise and with the Commission, a written declaration legally executed, that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in this Act and such public utility shall hold such permit under all the terms, conditions and limitations of this Act. The filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon the fulfillment of any contract theretofore entered relating to any rate,

charge or service regulated by this Act, and thereupon the public utility shall receive a certificate under the hands and seal of the Commission that such public utility is on and after a day to be therein specified, the holder of such indeterminate permit, which certificate shall be presumptive evidence of the facts therein stated.

B

Sec. 15 of Act 124 of 1921, approved February 15, 1921, is as follows:

Section 15. That all persons, firms, companies or corporations which have surrendered contracts, franchises or leases and are now operating under indeterminate permits granted by the Arkansas Corporation Commission, may within ninety (90) days after the passage of this Act make in writing, signed by official or officials shown to be duly authorized, application to the Municipal Council or City Commission of the municipality in which granted the original franchise, contract or lease, for the reinstatement of said franchise, concontract or lease, and when said application is made and filed with Clerk or Recorder of said Municipality, it shall be granted as a matter of right, and said franchise, contract or lease shall be thereupon reinstated by the Municipal Council or City Commission having jurisdiction, under the same conditions as existed at the time said indeterminate permit was granted by the Arkansas Corporation Commission and unless the application for reinstatement of said franchise, contract or lease is made within said time and in the manner herein provided, it shall be deemed a waiver on the part of any firm, persons, companies or corporation operating any public service utility, to insist upon the fulfillment of said franchise, contract or lease in any court of law, or equity; and all persons, firms, companies or corporatins above referred to in this Section electing not to reinstate its franchise, contract or lease under the terms of this Section, and all such persons, firms, companies or corporations holding or being entitled to operate under any other indeterminate permit heretofore issued by the Arkansas Corporation Commission, shall be permitted to continue to operate under the same terms or conditions specified in said indeterminate permit, but subject however to regulation in the same manner

and to the same extent and with like force and effect as in the case of other and like utilities.

C

Part of Sec. 7 of Act 124 of Feb. 15, 1921, Amending Sec. 10 of Act 571 of 1919, is as follows:

No railroad corporation, street railroad corporation, or common carrier shall hereafter abandon, take up or cease to operate for the transportation of passengers or freight any line or any portion of its line, which it may deem no longer necessary for the successful operation of its road and convenience of the public, without first obtaining the permission and approval of the Commission."

D

Sec. 17 of Act 124 of Feb. 1921, is as follows:

Section 17. The jurisdiction of the Municipal court, (Council) or City Commission of any municipality shall extend to and include all matters pertaining to the regulation and operation within the limits of any such municipality of any street railroad, telephone company, gas company furnishing gas for domestic or industrial purposes, pipe line company for transportation, distribution or sale of oil, gas or water, electrical company, water company, hydro-electric company or other company operating a public utility or furnishing public service within such municipality.

Every person, firm, company or corporation engaged in any such public service business within any municipality shall establish, make and maintain such adequate and suitable facilities, appliances, devices, connections, installations and improvements in said municipality as may be essential to enable such public utility to properly perform its public utility duties within said municipality, so far as may be required by its franchise or contract, or so far as it is within the police power of this state, or said municipality to require such service; and the Municipal Councils or City Commissions of Municipalities within the State of Arkansas, regardless of class, shall have the exclusive right, and it is hereby made their duty from time to time to make all reasonable and proper

rules and regulations with reference to the operation within such municipality of any such utility and to order the performance of any duty devolving on such public utility under its franchise or contract, if any, or under this or any other statute or law and from time to time to initiate, fix, promulgate, regulate, modify, amend, adjust, readjust or otherwise make and determine fair and reasonable rates to be charged by all public utilities for furnishing public utility service within such municipalities, which rates shall be so determined and fixed by an order or ordinance, after a hearing made, either upon its own initiative or upon application of any such utility to such municipal council or city commission; such hearing shall be held after thirty days written notice by the Common Council or City Commission to the utility of the time for such hearing, unless application for such hearing is made by the utility, in which event the hearing shall be had within thirty days after written application by such utility, unless the evidence with reference thereto cannot be reasonably adduced within such period and in the latter event such hearing shall be had as expeditiously as feasible; provided, however that Municipal Council or City Commission shall, within sixty days after written application for such hearing, approve or disapprove in writing, wholly, or in part, the schedule of rates and charges accompanying said petition; and if the said Municipal Council or City Commission does not so act within the period of sixty days, the schedule of rates or charges filed by such public utility shall be deemed to have been disapproved.

The said rates when so fixed or determined, shall be final and binding, subject to the right of appeal on the part of the utility as hereinafter specified.

Any such municipal council or city commission shall also have the right by order or ordinance, after due notice as aforesaid, to direct that said utility do or cause to be done within such reasonable time as may be herein prescribed, any reasonable thing necessary for the performance of any duty within said municipality of said public utility, subject to the right of appeal on the part of the utility as hereinafter specified.

E

Section 19 of Act 124 of Feb. 15, 1921, is as follows:

Section 19. Appeal from Action of Municipal Council or City Commission. Any person, firm, company or corporation aggrieved by any rate fixed by said Municipal council or City Commission or by any order or ordinance made in pursuance of this Act, shall have the right to have said action on the part of such Municipal Council or City Commission reviewed as to its legality, validity, fairness and reasonableness, by the Circuit Court of the County in which said Municipal Council or City Commission is located (or where there are two circuit courts in said county, then in the Circuit Court in the district where such council or Commission is situated) said review, however, by said Circuit Court shall be made provided and upon condition that the applicant files in said court or in the office of the Clerk thereof within sixty (60) days after the making of such order or ordinance or rate as to which the appeal is desired, its petition or complaint as in other cases setting out the order or ordinance or rate or other matter therein complained of, therein alleging according to the usual rules of pleading facts showing that the applicant is entitled to the relief therein prayed, upon which complaint summons shall be issued and served in the manner and for the times as in other circuit cases; the said appeal in the Circuit Court shall proceed de novo.

The Court in reviewing the action of the council or commission shall hear evidence and determine what rates would afford the appellant valid and reasonable compensation for the services rendered, and shall enter an order setting out such rates and cause the same to be certified to the council or commission, and such council or commission shall thereupon fix such rates as shall be in conformity with the finding of the court, provided, either party shall have the right to appeal to the Supreme Court within thirty days from the rendition of such order, in which event the said council or commission shall await the further orders of the court.

The Circuit Court shall have the power to require all proof to be taken in the form of depositions, if so desired by it, and to appoint a master to take the proof and make a finding and recommendation, subject to the approval of the

court. The Circuit Court or the Judge thereof in vacation of the County in which such municipality is located, shall upon petition therefor, have the power and is hereby delegated the duty to issue a preliminary restraining order with or without bond as may seem proper, restraining the violation of any order or ordinance made by any municipality under this Act, or restraining the violation of any duty on the part of any public utility prescribed by this Act or by any municipality hereunder and upon final hearing upon such petition to make permanent on the part of said court, said preliminary restraining order.

F

Section 21 of Act 124 of 1921. Appeal to the Supreme Court within thirty days after rendition of any order of any Circuit Court under the terms of this Act, whether such order be rendered on appeal of Municipal Council or City Commission action or Arkansas Railroad Commission action, any party aggrieved may file a motion in writing in said Circuit Court or in the office of the Clerk thereof, praying an appeal from such order to the Supreme Court of Arkansas, which motion when so filed shall be granted as a matter of right by the said Circuit Court or by the Clerk thereof; and in such case, the appeal to the Supreme Court shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such Circuit Court, except that any finding of fact by the Circuit Court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable.

The record shall be lodged in the office of the Clerk of the Supreme Court within sixty days from the rendition of the order in the Circuit Court, and all such cases shall be regarded and treated in the Supreme Court as cases involving public interest and shall be advanced and given preference on the docket of said court on motion of either party.

No. 220

In the Supreme Court of the United States

OCTOBER TERM, 1924

FORT SMITH LIGHT & TRACTION COMPANY,
PLAINTIFF IN ERROR,

vs.

FAGAN BOURLAND, M. J. MILLER, AND M. F. SMITH,
CITY COMMISSIONERS OF THE CITY OF
FORT SMITH, ARKANSAS,
DEFENDANTS IN ERROR

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT

This is not a rate case. Nor is it a case in which it is sought to place an additional burden upon plaintiff in error. The question is, whether plaintiff in error shall be allowed to **abandon** its line of Street Railway, 1620 feet in length on Greenwood Avenue in the City of Fort Smith. A great deal is said in brief about the cost of reconstructing this section of the line, but the order of the City Commission was merely a denial of the right of plaintiff in error to withdraw service by abandoning said line of railway. No new duty is laid upon the company. Of course, it may be said that this order was tantamount to a command to maintain its line, but that is a thing which it is doing now. There is no command that the line be reconstructed, but the order is to continue service.

Plaintiff in error has had the benefit of three hearings

in this case. First, before the City Commission; second, in the Circuit Court, upon trial de novo; and third, in the Supreme Court, which for all practical purposes, was a trial de novo, of both fact and law, upon the record made in the Circuit Court.

We wish first to call the court's atttention to the fact that the section of railway which plaintiff in error seeks to abandon is well within the built-up portion of the City of Fort Smith. An inspection of the blue print map attached to the printed record in the case shows that the terminus of this line is nearer the principal business street, Garrison Avenue, than the terminus of any other one of the company's lines of street railway. The map also shows that the turn in the line from Little Rock Avenue into Greenwood Avenue **is not at right angles by something like 40 degrees.** It is in evidence that the distance from the intersection of Greenwood Avenue and Little Rock Avenue to Garrison Avenue is 6,720 feet. Garrison Avenue is the principal business street of the city, and all street cars traverse it. The Little Rock Avenue cars run along Greenwood Avenue, Little Rock Avenue, Garrison Avenue and out Fifth Street to the junction with the Eleventh Street Car line, near the Car Barns, and return over the same route. The total length of line from the Oak Cemetery (Called also City Cemetery) on Greenwood Avenue to the Junction near the car barns as ascertained from the map, which is drawn to the scale of 800 feet to one inch, is 19,940 feet. The cars on this line have continuous passage from one end to the other. **That portion of it on Greenwood Avenue is in no sense an independent operating unit.** The same cars pass over it which pass over the balance of the line. The entire line therefore, begins at the junction with the Eleventh Street Car line and ends at the city cemetery, or vice versa, and that portion sought to be abandoned is approximately 1-12, but not quite, of the whole line. This line, of course, is a constituent part of the entire system of street railways in the City.

There seems to us to be something radically wrong with the figures made by plaintiff in error in regard to the revenue on this line, as a whole, or that its contention of loss on the operation of the Greenwood Avenue portion is untenable because according to the count of passengers made

by plaintiff in error's witnesses, there was an average of 202 passengers per day on the Greenwood Avenue extension. If the balance of the line yielded the same number of passengers in proportion to length, the daily carriage would be 2,424 passengers.

Comparing the number of passengers on the Greenwood Avenue extension with the number of passengers which the entire line would carry daily, if the balance of the line received as many passengers in proportion to its length as the Greenwood Avenue Extension, we find that the entire line ought to haul 2,424 passengers per day. Which at seven cents each, would yield a revenue of $167.68 per day for the entire line instead of the average as shown by the schedule set forth by the plaintiff in error of $108.25 per day.

The count made by plaintiff in error shows that more passengers embarked and debarked **at the end of the line than at the other places.** This portion of the line sought to be abandoned is a little less than one-third of a mile long. In case of abandonment, plaintiff in error assumes a loss of only one-third of the traffic, on this line. In other words, it is taken for granted that the people would walk the extra distance to embark on the cars at Humphrey's Corner, but this is a mere guess.

Plaintiff in error has calculated the average car mile expense at 19.23 cents, for the entire system.

THE STATISTICS

Referring to the statistics for the different lines, exhibited by plaintiff in error (Brief 14), it will be observed that the company is operating an "E" Street Line upon which according to their figures, they are losing on the line as a whole since the average car receipts per car mile per day is 19.21 cents, and the expenses 19.23 cents. On the Van Buren Local, according to the statistics, they are losing 9.62 cents per car mile. The cars on that line travel 138.44 miles per day, and multiplying this by the loss per car mile of 9.62 cents gives a net loss on the operation of $13.31 plus, per day.

On the Little Rock Avenue Line, the average cash re-

ceipts per car mile per day, as stated in the table of statistics, is 25.30 cents, while the Park Hill Line is put down as 25.31 cents. It is therefore argued that there are four lines yielding larger car mile receipts than the Little Rock Line, but as a matter of fact, there is not as much difference between the car mile receipts for the two lines as the table shows. To be exact, by running figures to three decimals, the car mile receipts on the Little Rock Avenue Line amounts to 25.302 cents and on the Park Hill Line, 25.308 cents, while the average for the entire system is 26.39 cents, with two lines, to-wit: "E" Street and the Van Buren Local, losing money, the "E" Street not quite breaking even, and the Van Buren Line resulting in a daily loss of $13.31 per day as above shown.

PROSPECTIVE INCREASE OF PATRONAGE

The Supreme Court found as did the Circuit Court, that there would be a substantial increase in patronage on the Greenwood Avenue part of the line. Counsel for plaintiff in error seem willing to dismiss this finding with a deprecating gesture; but it is a significant and noteworthy fact that no witness was called to contradict the testimony of witnesses for defendant in error, and the Company's witnesses were absolutely silent on the question of an increase of the patronage on Greenwood Ave. portion of the line; and surely in a city of 35,000 or more inhabitants, some one would have been found to contradict the witnesses on this proposition; if, the facts are other than as stated by the witnesses, Little, Walker, Mrs. McCann, Mrs. Vincent and Mr. Anderson.

There is another inarticulate, but credible witness on this proposition, to-wit: The map of the City, attached to the record in this case. An examination of this map is very important to an understanding of the merits of the case. As stated above, the terminus of the Little Rock Line is nearer to the heart of the City than that of any other line. On the map, street car lines are indicated by heavy lines in the streets. The line terminates at the northwest corner of the Cemetery, but on the west side of Greenwood Avenue is the Cemtery, but on the west side of Greenwood Avenue is Park Hill Addition, lying opposite the cemetery. This addition is all platted, served with sewers, gas, electricity and

largely paved, and is nearly all vacant property, subject to development. South of Oak Cemetery is Pelly Addition, platted and considerably built up. This is referred to in the testimony as Pelly Hill. There is a statement to the effect that it is five blocks from the terminus of the line to Pelly Hill, but the map shows that it is only three and one-half blocks, and there is also a statement that Pelly Hill is nearer to the Park Hill Car line by 200 feet than it is to the terminus of the Little Rock Line, but according to the map which is drawn to a scale of 800 feet to one inch, Pelly Hill is nearer to the terminus of Little Rock Line. The distance from the east side of Greenwood Avenue to the Park Hill Line as shown on the map is two and two-thirds inches, while the distance from the end of the Little Rock Line to the Northwest corner of Pelly Addition is one and one-half inches. The distance from the terminus of the Little Rock Line to the Southwest corner of Pelly Addition is two inches. This shows that Pelly Hill is nearer by 600 feet; approximately two blocks, than the Park Hill Line. The land lying immediately north of Oak Cemetery is platted for a distance of three blocks and according to the testimony of Mr. Little, it is being rapidly built up and according to the testimony of Mr. Walker, there has been considerable building in the last few years along the Greenwood Avenue part of the Car Line on both sides, and that there is a prospect of its continuing through the next year or so. There is a great deal of vacant territory not built on. **There is not a great deal of such territory left in Fort Smith outside of the Park Hill Addition,** which is largely vacant property, and lies west of Greenwood Avenue, (R. 5 and 6.) Mrs. McCann testified that she lives on Pelly Hill and that people who live there use the Little Rock Line rather than the Park Hill Line, which is explained by the difference in distance from the two lines.

A further examination of the map shows a car line running out on Park Avenue to Albert Pike Avenue, quite a distance farther from the main part of the city and not nearly so well built up. The land on the South side near the end of the Park Avenue line (called "E" Street Line), for a considerable distance, is not even platted and beyond the end of this line, there is only two blocks platted.

On the question of revenues, it is pertinent to state

that according to the showing made by the plaintiff in error, there has been no alarming decrease in the net revenues for a number of years. According to the record, the net revenues of the company (not deducting depreciation and using round numbers only), from 1905 to 1922, showed that 1911 was the highest, $83,000; 1912 lowest, $8,000; 1916 they were $25,000; 1917, $48,000; 1918 $46,000; 1919, $61,000; 1920, $71,000; 1921, $68,334.87; 1922, $68,984.99. This shows a steady upward climb since 1916, except for the last two years, when there was a slight decrease over 1920, with 1922, in excess of 1921.

THE LAW

In our view, counsel for plaintiff in error ignores or loses sight of the **duty** resting upon the utility to serve the public; and their argument proceeds as if the question depends entirely upon the revenue derived from its operations. If the doctrine against the right to **pick and choose** is not applicable in this case, we can not imagine one where it would apply.

The question here is not one of rendering a different service from that now rendered, or of reducing the service but **one of abandonment altogether;** and while the revenue feature is material, it is not decisive, nor is it even controlling. The plaintiff in error is operating under an indeterminate permit, having divested itself its franchise rights granted by the city. It is occupying the field. It can at any time withdraw entirely, if the facts and circumstances warrant that course, but it can not occupy the field and pick and choose the localities which it will serve, regardless of the convenience of the public.

The case at bar is controlled by the doctrine enunciated in M. P. Ry Co., vs. State of Kansas ex rel. Taylor, 216 U. S. 262, in which the facts were:

State Board of Railway Commissioners issued an order to the plaintiff in error to operate a passenger train upon its branch road from Madison, Kansas to the Missouri-Kansas State Line.

The branch road lay between Madison, Kansas and

Montieth Junction, Missouri, a distance of 108 miles; there were no terminal facilities at the state line or any junction point; and the distance from Madison to the State Line was 89 miles; in fact, no terminal facilities were at Montieth Junction but the company had to run its trains 3 miles further on to Butler for terminal facilities; it being conceded that the order would entail the expense of furnishing terminal facilities and that the service would entail great financial loss, the Supreme Court of the United States in an exhaustive opinion by Chief Justice White, after disposing of other assignments of error not in the case at bar, said:

"This brings us to consider the several reasons relied upon to establish first, that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power."

As in case at bar, the chief reasons given by the plaintiff in error is that the order, if upheld would, under the evidence show that the order commanded could not be rendered effective without pecuniary loss and further as said by the court in this opinion along this line; "And this, it is insisted, is the case, not only because of the proof that pecuniary loss would be occasioned by performing the particular service ordered, considering alone the cost of that service and the return from its performance, but also it is asserted the proof establishes that the earnings from all sources, not only of the branch road, **but all the road operated by the Missouri Pacific in Kansas, produced no net revenue and left a deficit."**

In that case as here, the plaintiff in error assumes that this court is bound to consider the evidence and is not bound by findings of facts by the State Court but must give the evidence an independent examination for the purposes of passing upon the constitutional question presented and the court continues: "But we do not think that the case here presented requires us to consider the issues of fact relied upon EVEN IF IT BE CONCEDED, FOR THE SAKE OF ARGUMENT ONLY, THAT ON A WRIT OF ERROR TO A STATE COURT, WHERE A PARTICULAR EXERTION OF STATE POWER IS ASSAILED AS CONFISCATORY, BECAUSE ORDERING A SERVICE TO BE RENDERED FOR AN INADEQUATE RETURN, THE PROOF UPON

WHICH THE CLAIM OF CONFISCATION DEPENDS, WOULD BE OPEN FOR OUR ORIGINAL CONSIDERATION, AS THE ESSENTIAL AND ONLY MEANS FOR PROPERLY PERFORMING OUR DUTY OF INDEPENDENTLY ASCERTAINING WHETHER THAT HAD BEEN, AS ALLEGED, A VIOLATION OF THE CONSTITUTION. We say this because, when the controversy here presented is properly analyzed, THE FIRST AND PIVOTAL QUESTION ARISING IS WHETHER THE ORDER COMPLAINED OF DID ANYTHING MORE THAN COMMAND THE RAILROAD COMPANY TO PERFORM A SERVICE WHICH IT WAS INCUMBENT UPON IT TO PERFORM AS THE NECESSARY RESULT OF POSSESSION AND ENJOYMENT OF ITS CHARTER POWERS."

The court in that case pointed out the distinction between the exertion of state powers to establish rates in such a manner as would, in effect, amount to a confiscation, and an order requiring a public service utility to perform the services which by its charter and legal status, it was required to perform, and quoted from Atlantic Coast Line R. Co. vs. North Carolina Corp. Com. 206 U. S. 1 with approval as follows:

"This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty, does not, in and of itself, necessarily give rise to the conclusions of unreasonableness as would be the case where the whole scheme of rates was unreasonable under the doctrine of Smyth vs. Ames 169 U. S. 526."

The court holds that the pecuniary loss is merely an item to be taken into consideration in determining the reasonableness of the order and continues "Other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling a performance of such a duty at a pecuniary loss is unreasonable."

And continues: "Was the duty which the order here commanded one which the corporation was under absolute obligation to perform as the result of the acceptance of the

charter to operate the road, is then, the question to be considered."

After expressing a doubt in some instances that a duty to put on a passenger service train was existent held, though the company was carrying passengers on a mixed train, that such an order as matter of law, was not unreasonable and continues:

"The contention that the order is unreasonable in and of itself, irrespective of whether there is profit in the operation of the train service which the order commands to be operated, because it directs the movement of the passenger train directed to be run to the state line, where, it is said, there are no terminal facilities, and no occasion for the termination of the transit, is disposed of by the considerations previously stated. We say this because its unsoundness is demonstrated by the reasoning which has led us to conclude that there was no merit in the contention that the fact of pecuniary loss was itself alone adequate to show the unreasonableness of the order. This follows from the principle which we have previously expounded, to the effect, that THE CRITERION TO APPLY IN A CASE LIKE THIS IS THE NATURE AND CHARACTER OF THE DUTY ORDERED, AND NOT THE MERE BURDEN WHICH MAY RESULT FROM ITS PERFORMANCE."

The most that can be said for the contentions of plaintiff in error in case at bar is that it is an order to maintain a service which it has already been maintaining for 17 years which will in effect prevent the utility from realizing increased profits heretofore considered by it remunerative; there is no evidence, even though the court is authorized to review the evidence in detail, that would warrant a finding that whatever need for this service which may have existed heretofore, has diminished or been abrogated or eliminated by any changed conditions of the physical properties in the neighborhood but on the other hand the evidence shows that the need for the service is increasing rather than diminishing and the Supreme Court of the State to say nothing of the Municipal authorities, so found.

In case at bar, it was for the City Commission to determine what the public necessity and convenience demanded and its refusal to grant the petition of plaintiff in error

must be taken as conclusive of this fact unless the facts disclose affirmatively that it acted beyond its powers by violating some Constitutional rights of plaintiff in error.

Milwaukee Electric Ry. & Light Co.
vs.
State of Wis. ex rel City of Milwaukee
252 U. S. 100-106

In this case, question was presented to the United States Supreme Court upon writ of error from the Supreme Court of Wis. contesting the right of the City of Milwaukee to require the Traction Company to pave between its tracks and the plaintiff as one of its assignment of errors claimed, quoting from the opinion by Brandeis, J. was:

"The company insists that the ordinance is void, also, for an entirely different reason. It alleges in its return that for a long time prior to that date the earnings from its street railway system in Milwaukee, were considerably under six per cent of the value of the property used and useful in the business, and were less than a reasonable return. It contends this allegation was admitted by the demurrer; and that to impose upon the company the additional burden of paying with asphalt will **reduce its income below a reasonable return upon the investment and thus deprive it of its property in violation of the 14th Amendment.** The supreme court of the state answered the contentions by saying: "The company can at any time apply to the Railroad Commission and have the rate made reasonable." The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension of facilities, or forbidding their abandonment. (Citing cases). **But there is no warrant in law for the contention that merely because its business fails to earn full 6 per cent upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power."**

The cases cited by plaintiff in error to support its contention that this court may review the facts do not support the theory which it seeks to apply here. None of the cases do more than enunciate the doctrine that this court will ascertain if there is any testimony to support the find-

ings and in cases where the facts are so intermingled with the Federal right claimed as to make it necessary to ANALYZE (Not pass upon the truth of or the preponderance of) the facts. In no case, has this court held that it may determine the preponderance of the testimony nor has it refused to be bound by findings of facts except to ascertain if such findings are without testimony to support them. And the cases cited show this is the theory of the court.

Therefore the necessity for the service required and which follows the refusal of the Commission to permit the abandonment, being supported by competent testimony, whether or not the testimony is true, or will prove true hereafter can not be reviewed by this court, else it then would assume the power to determine the weight of testimony.

Selectman vs. Citizen's Electric Company, 199 Mose, 394, 19 L. R. A. (NS) 865.

The facts were stated by the Court:

"There is nothing either in the respondents' charter, or in that of its predecessor, or in any other statute before 1891, or in the grant of any location, to the effect that the line in question shall be continued in operation, and the view that, just as these locations might be revoked by the Municipal authorities, so they might be abandoned or their use discontinued by the Railway Company."

Here the question was, in as much as there was no contracted or statutory obligation upon the Railway Company by virtue of their charter, or their franchise to run their cars, and no statute requiring regulations as to service, the citizens could not require the Railway Company to perform.

In State of Iowa vs. Old Colony Trust Company, 215 F. 307, the facts as found by the Federal District Court and taken for granted as true by C. C. Ap. were as follows, as stated by the court:

"The short stretch of road sought to be abandoned is equipped for operation by steam **only,** while the balance or **main** part of the system is equipped for operation by electricity; there is little public necessity for the continued operation of the steam line; it is in wretched physical condi-

tion, unfit and dangerous for use and requiring the expenditure of a large amount of money ($273,000), to rehabilitate it. The railroad itself (**the whole system**) is hopelessly insolvent (then in hands of Receiver) neither it nor the receivers have money or means for raising money requisite for such a rehabilitation, the continued operation of the main line or electric line is of large public importance; the steam line is and by itself does not pay its operating expenses, and to compel them or any subsequent purchasers of the property to operate it, would seriously **embarass if not prevent** the successful operation of the electric line; the revenues of the entire line of road do not justify the reconstruction and operation of the portion of it sought to be abandoned."

The facts further given by the trial court are that the system was insolvent with not sufficient revenues to pay operating costs and interests on its mortgaged debt and had never paid a dividend. Further that the line sought to be abandoned was a branch line from Des Moines Junction to Goddard, while the main line was from the City of Des Moines to Fort Dodge, and bore the same physical relation to the system as if it were an entirely different Railway Company (**from the Map given**) it would appear the branch line bore about the same relation to the main line as the Mansfield line here does to the Main line except in that branch line it was operated by steam while the main line of electricity, requiring separate equipment.

After stating the general rule to the effect that the Railroad Companies were required to render the services for which they are given franchise to perform, says that there are exceptions and that the case is an example, saying: "Here is a case where the line sought to be abandoned is not only not self-supporting, but its continued operation jeopards the successful operations of the entire system of which it is merely a part. More it's continued operation in its present condition is dangerous to life and property and there is no **money** or **financial ability** to improve its condition. Not only so, but there is little public necessity for its continued operation."

The question of taking property without just compensation does not seem to have been argued or considered be-

cause there was no question but the whole system was insolvent and was then being sold by order of the Court.

Miss. Ry. Com. vs. M. O. Ry. Co. 244 U. S. 388, the facts were:

The Commission ordered the restoration of six trains daily, three each way; two of these were interstate trains and one an intrastate train; these trains served a community of a little over 5,000 people and after these trains were taken off two trains each way daily was maintained between two of the points and three trains each each way between the other points; the undisputed testimony showed that this service was adequate and supported by 65 affidavits of business men along the line; and the only contrary testimony on this phase of the case was a few commercial travelers who were placed to an inconvenience but no real loss; the undisputed testimony showed a deficit in the whole operation of the road and a particular loss as to passenger service all over the road, and was at the time carrying approved unpaid vouchers for about $500,000; that the falling off of the road's earnings for 17 days of October as compared with the preceding year was $165,742 or approximately $10,000 per day and that the savings by reducing the number of trains per day was $10,000 per month; that the company had cut expenses to the bone and salaries of President and Vice President were cut 20 per cent and others in proportion to avoid insolvency; that prior to the business depression the company was operating upon a margin of $85,000 per year which would be swallowed up in nine days by the losses of the year in which the trains were discontinued; the court found from the facts, that it could not be said that the three trains daily each way to the north of Meridian and the two trains south of Meridian could not be said to be inadequate upon a finding by the District to that effect; this case was taken upon the Ry Com. against the railroad company from the District Court for the Southern District of Mississippi in which court the Railroad company had filed a bill for injunction and succeeded in obtaining the same and the Supreme Court affirmed it, apparently on the same findings of the U. S. District Court that the service remaining after the taking off of the six trains was adequate.

Brooks-Scanlon Company vs. Ry. Com. La. 251 U. S. 396 the facts were:

This was a case of taking off a FEW trains, not a secession of the entire service for a part of the road. This was a case where the company was showing a deficit over its entire properties; no question of abandonment of a part of its road.

The Banner Lumber Co., a Louisiana corporation, formerly owned timber lands, saw-mills and a narrow gauge railroad which was primarily a logging road; the Banner Lumber Company sold the whole property to Brooks-Scanlon Lumber Co., and the stockholders of this corporation obtained a charter for the railroad as the Kentwood & Eastern Railway Company. It was managed by this corporation with separate accounts prior to this after obtaining charter, an oral lease was made to the new company. Then the Brooks-Scanlon Lumber Company sold all its property, including the railroad to Brooks-Scanlon Co., who is the plaintiff in error in this case. On 1st July, 1906, the Brooks-Scanlon Co. made a written lease of this logging road to the railway company and sold the railway company all the rolling stock and other parapheranalia of the road; thereafter the railroad was run as a common carrier doing a small business but depending upon the hauling of logs for the Brooks-Scanlon Company for its revenues rather tha the public.

In the course of time the logs were cut and there was no haulage to make the road profitable and the Brooks-Scanlon Company terminated the lease to the railway company and it discontinued business on April 22, 1918 with the assent of the State Commission under the view it had no power to prevent it. Later and subsequent to a decision of the State Supreme Court, the Commission issued a notice to the Brooks-Scanlon Company and the railway company to show cause why the railroad should not be operated. On final determination the Supreme Court of Louisiana held that these two companies were practically the same companies and concluded that although the railroad showed a loss, the test was whether the plaintiff could be required to operate its road although the railroad showed a loss; the test applied by the court was that the net results of the whole

corporation both as a lumber company and railroad company should be considered in determining whether or not the running of the road constituted a taking without due process; in other words, the profits of the lumber business were to be considered in determining the profits and losses as well as the income or loss of the railroad. The U. S. Court held that such was not the test.

This case is distinguished from the case at bar by the fact, that an entire service was to be abandoned, not a portion of it; also the state court was taking the profits out of one business, purely a private concern and applying them to the public service.

The Trial Court and the Supreme Court found that the patronage upon the line sought to be abandoned will increase rather than diminish. (R. 25).

The extent of the Supreme Court's power to review this finding is confined to an examination of the evidence to ascertain if there is substantial evidence to support this finding.

This precludes any finding that the refusal to permit the abandonment of this part of the line, is arbitrary and unreasonable, except it be solely from the fact that there is an inadequate return on the investment; this the supreme court has said in above case is insufficient, of itself, to constitute such an arbitary and unreasonable regulation as will conflict with the rights of the plaintiff in error under the Federal constitution.

In the case of Railroad Commission of Arkansas vs. Saline River Ry. Co., 119 Ark. 329, among other things, the Court following the Supreme Court of the United States, announces the rules of law applicable to the facts in this case as follows:

"Its obligation to discharge the duties imposed by it charter must be construed in connection with the nature and productiveness of the corporate business as a whole the character of the service required and the public need for its performances. For that reason, its statutory duty to operate its road may be compelled, although by doing so, as an incident, some pecuniary loss may result from rendering such service. Missouri Pacific Ry. Co. vs. Kansas, 216 U. S. 262."

And further the court says:

"The fact, as above indicated, that the order made by the Railroad Commission was likely to cause pecuniary loss to the Railroad Company was not of itself, sufficient to make the order arbitrary and unreasonable; but this fact was a circumstance to be considered in determining whether or not the order was arbitrary and unreasonable."

Witness for plaintiff in error testified that the present operation of the company is to give for part of the day a 15 minute service on Little Rock line and for the rest of the day about one-half the time, a 20 minute service. They further stated that with the line on Greenwood Avenue abandoned, the company would save one car in operating the line and have 15 minute schedule for the entire day. And that the company is now using four cars per day, whereas with the extension eliminated there would be a 15 minute service throughout the day using only three cars. (R. 4-5¾).

As we have shown, that portion of the line on Greenwood Avenue is hardly one twelfth (1-12) of the entire Little Rock Line and how it is that cutting off one-twelfth (1-12) of the distance, would eliminate one-fourth of the number of cars and give a faster schedule throughout the entire day on the remaining eleven-twelfths (11-12) of the line is inexplicable. Nor does the general manager of the plaintiff in error or his engineer or other witnesses attempt to explain this proposition. It is probably on a parity of reasoning with their allocation of the expense of operating the line and of the receipts therefrom. These propositions are to our minds simply untenable and so unreasonable on the face of the matter as to be unworthy of serious consideration.

This company was operating under a franchise granted by the City of Fort Smith, until the passage of the Act in 1919, and after the passage of this act, it voluntarily surrendered its municipal franchise to receive from the corporation commission, an indeterminate permit. Later in 1921, the act of 1919 was amended and plaintiff was given the opportunity to reinstate its municipal franchise, by surrendering its indeterminate permit and signifying its desire again to assume its municipal franchise obligations. But it

refused, and elected not to reinstate its franchise and continued to operate under the indeterminate permit. In thus surrendering its municipal franchise, and electing to operate under the indeterminate permit, it must be held to have assented to and agreed to be bound by the conditions of the Act of 1919, under which the permit was issued; and this amounted to a contract with the State that it would comply with the conditions of said statute, one of which is (Sec. 10, Act 571—Acts of 1919—Appendix "C" of Plaintiff in Error's brief): "No railroad corporation, street railroad corporation, or common carrier shall hereafter abandon, take up or cease to operate for the transportation of passengers or freight any line or any portion of its line, which it may deem no longer necessary for the successful operation of its road and convenience of the public, without first obtaining the permission and approval of the Commission."

Now the Supreme Court of the State of Arkansas, in this case has held that under its indeterminate permit, plaintiff in error might be allowed to abandon and cease to operate its system as a whole, but that it has no right to abandon a portion of its line and partially withdraw service from the public without the consent of the public authorities.

Section 15, of the Act 571, 1919, specifically provides that the utility receiving an indeterminate permit shall hold such permit under all the terms, conditions and limitations of the Act. Now one of the important conditions of said act is that it may not abandon, take up or cease to operate any line or any portion of its line without first obtaining the permission and approval of the Commission, which approval it has not in this case obtained. Notwithstanding it has been heard before every commission and court authorized by the laws of the State of Arkansas, to pass upon its request.

As stated by the Supreme Court of Arkansas, in its opinion in this case, there is much reason for a distinction between the construction of a line as an original project and the right to withdraw it after once constructed and put into operation. The project must be considered as a whole in determining whether a given rule or requirement is unreasonable. Since the company is confessedly operating the "E" Street Line and the Van Buren Local Line at an

actual loss, it is unreasonable for it to abandon the Greenwood Avenue Line while the line as a whole is yielding some profit on its operation, and we believe as shown above, that this particular section of the line is as fully remunerative if not more so, than the remainder of the Little Rock Line. Is it reasonable and fair to the public to allow this company to pick and choose portions of its system for service and cease to give service on others, while it is in possession of the field with a right to withdraw entirely therefrom? Is an order or judgment of the court which commands the performance of a duty unreasonable or unfair? Is the question of return or confiscation the vital one or is it one in regard to the **duty** of the utility? We believe these questions have been answered in favor of defendants in error in the authorities cited above and in those cited by the Supreme Court of Arkansas, in its opinion in this case.

There is no lack of due process in this case nor is there a taking of private property for public use without compensation. The property of the company was voluntarily devoted to the public use and in doing so, obligations to serve the public were assumed.

In case the Court determines the question to be one for review by certiorari, we ask the court to consider this brief on that procedure, as well as on the writ of error.

We therefore respectfully urge that there is no error cognizable by this court in this case, and that the judgment of the Supreme Court of Arkansas should be affirmed, and writ of certiorari denied.

Respectfully submitted,

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